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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

LUIS FELIPE APONTE,

Defendant and Appellant.

E047320

(Super.Ct.No. FVA800598)

OPINION

APPEAL from the Superior Court of San Bernardino County. Stephan G. Saleson, Judge. Affirmed.

Vicki Marolt Buchanan, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, James D. Dutton, and Charles C. Ragland, Deputy Attorneys General, for Plaintiff and Respondent.

1. Introduction

An information charged defendant Luis Felipe Aponte with two felony counts of

violating Penal Code section 69,¹ resisting an officer. A jury convicted Aponte of two counts of the lesser, misdemeanor offenses of violating section 148, subdivision (a)(1). The trial court sentenced defendant to three years of probation with credit of 242 days for time served.

We reject defendant's sole argument on appeal, which is that the court should have given a unanimity instruction.

2. Facts

Two Fontana police officers, David Campa and David Janusz, were on patrol separately one night about 11:00 p.m. when they both observed defendant jaywalking across four lanes of traffic on Foothill Boulevard while cars swerved to avoid him.

Defendant confronted Campa, saying "What the fuck are you looking at, asshole?" Using the public address system on his patrol car, Campa ordered defendant to sit on the curb. Instead, defendant began running and Campa pursued him on foot, yelling at him to stop.

When Campa got close enough, he collared defendant and pushed him to the ground, where defendant landed on his stomach and face. Campa commanded defendant to show his hands, which were concealed at his waist. Defendant refused to cooperate and Campa punched him three times in the upper back to obtain compliance.

When officer Janusz arrived, defendant rolled over on his back and began swinging his fists and kicking at both officers. Campa punched defendant another three

¹ All statutory references are to the Penal Code.

times. Defendant sustained a bloody nose. Janusz hit defendant on the thigh and in the ribs with a flashlight. Defendant finally ceased resistance. A police expert testified the officers used appropriate defensive tactics and did not use excessive force.

Defendant testified he was crossing Foothill at a crosswalk where he had the right of way. Defendant denied issuing any profane challenges to Campa. Instead, he claimed Campa gunned his engine and demanded, “What’s your problem?” Defendant began running because he feared Campa was chasing him with the patrol car. When he felt safe, defendant stopped in the parking lot. He got on the ground because Campa ordered him to do so. He did not hide his hands. While Campa pinned defendant down, Janusz kicked and punched him. Defendant had once pleaded guilty to assault.

3. Unanimity Instruction

On appeal, defendant argues the court should have given sua sponte a unanimity instruction (CALCRIM No. 3500). Defendant tries to characterize the incident with Campa as four discrete events. First, defendant ignored Campa’s order to stop and ran away. Second, he refused to stop when Campa caught up with him in the parking lot. Next, after Campa threw him to the ground, defendant refused to show his hands. Finally, he rolled over on his back and flailed at Campa, hitting and kicking him in the chest. Defendant asserts that the jury may not have agreed on the specific act supporting the verdict. (*People v. Russo* (2001) 25 Cal.4th 1124, 1132.)

No unanimity instruction is required when the offense constitutes a continuous course of conduct: “A requirement of jury unanimity typically applies to acts that could have been charged as separate offenses. [Citations.] A unanimity instruction is required

only if the jurors could otherwise disagree which act a defendant committed and yet convict him of the crime charged. [Citation.].” (*People v. Maury* (2003) 30 Cal.4th 342, 423.) “The ‘continuous conduct’ rule applies when the defendant offers essentially the same defense to each of the acts, and there is no reasonable basis for the jury to distinguish between them.” (*People v. Stankewitz* (1990) 51 Cal.3d 72, 100, citing *People v. Crandell* (1988) 46 Cal.3d 833, 875.)

Here defendant’s offense was “based on a continuous course of conduct, whose acts were so closely connected in time as to form part of one transaction.” (*People v. Maury, supra*, 30 Cal.4th at p. 423.) As argued by the prosecutor, during the brief encounter after Campa first ordered defendant to stop until defendant quit hitting and kicking the officers, defendant engaged in the same continuous sequence of resistance, in violation of section 148, subdivision (a)(1). (*People v. Lopez* (2005) 129 Cal.App.4th 1508, 1533-1534.)

We are not persuaded by defendant’s creative effort to describe four different defenses to four separate offenses, as follows: defendant did not refuse Campa’s command to stop but was trying to escape being run down by the patrol car; he complied with the second command by getting on the ground; he did not conceal his hands; and, finally, when the officers used excessive force, he was protecting himself. Instead, we deem that defendant asserted the same general defense to the entire encounter. He claimed he did not resist the officers except to protect himself. But he did not offer four separate defenses.

Finally, we agree any error was harmless. Under either the *Chapman* or *Watson*² standard of review, there was no prejudice because defendant would surely have been convicted. The jury obviously rejected defendant's version of the encounter, i.e., that he was the innocent victim of unprovoked police brutality.

4. Disposition

We affirm the judgment.

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s/Gaut
J.

We concur:

s/Ramirez
P. J.

s/King
J.

² *Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Vargas* (2001) 91 Cal.App.4th 506, 561.